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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/667,922	09/22/2003	Robert Edward Gott	J6834(C)	9900

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EXAMINER	
HUGHES, ALICIA R	
ART UNIT	PAPER NUMBER
1614	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	04/19/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)	
	10/667,922	GOTT ET AL.	
	Examiner	Art Unit	
	Alicia R. Hughes	1614	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *29 January 2007*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-11* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-11* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *2 sheets*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Status of the Claims

Claims 1-11 are currently pending and are the subject of this Office Action.

Restriction Requirement

The Office acknowledges receipt of Applicants' response to the Requirement for Restriction and notes that the elections in the Applicants' response, is with traverse. Upon consideration, the Office deems Applicants' traversal meritorious and as a result, removes the restriction and election requirement.

Claim Rejections - 35 U.S.C. §112.2

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The phraseology "in an amount sufficient to provide a cosmetic benefit" in claim 1 is vague and renders a claim that makes it impossible for a skilled artisan to determine the metes and bounds of the invention. The reference in the specification, at page 17, para, 00032, does not adequately define the limitations of the claim in a manner that makes the invention clear. As a result, one of ordinary skill in the art would not be reasonably apprized of the scope of the invention. Applicant is encouraged to reword the language "in an amount sufficient to provide a cosmetic benefit" in a manner that confers, with certainty, the scope of his invention.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claim 1, 4, and 7-11 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-2 of U.S. Patent Application No. 10/697608. Although the conflicting claims are not identical, they are not patentably distinct from each other, because they contain identical subject matter and both relate to cosmetic compositions. For example, both disclosed inventions comprising destructurized starch that is present in a water dissolvable carrier with a surfactant or emollient where a cosmetic agent is present in overlapping ranges.

While a fragrance is not explicitly disclosed as part of the '608 claims, the disclosure advises that "... fragrances ... may also be included in the compositions of the present invention ... these substances may range from about 0.05 to about 5%, preferably between 0.1 amd 3% by weight" (Specification, Page 14, para. 43), which bring this invention within the total purview of the claimed invention that is the subject of this Action..

Claim Rejections – 35 U.S.C. §103(a)

The following is a quotation of 35 U.S.C. §103(a), which forms the basis for all obviousness rejections set forth in this office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various

claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-11 are rejected under 35 U.S.C. §103(a) as being obvious over U.S. Patent No. 5,925,380 [hereinafter referred to as "Roulier et al"] in view of U.S. Patent No. 6,248,338 [hereinafter referred to as "Müller et al"].

Roulier et al. teach a new dosage form for cosmetic or dermatological use "in the form of an expanded solid composition whose matrix comprises a cellular network formed from a starch-rich product and contains expanded thermoplastic hollow particles of homopolymer or copolymer of an ethylenically unsaturated monomer or mixture of such monomers" (Col. 1, lines 17-23). Importantly, the compositions "have the appearance of expanded cylinders, pellets, leaves or flakes, and can contain a sufficient amount of fillers to obtain good disintegration" (Col. 1, lines 34-37). The compositions can be "stored in the dry state, and be very readily amenable to rehydration after immersion in an aqueous medium to reconstitute formulations for make-up such as make-up foundations or formulations for care or hygiene such as creams, milks, foam baths, gels and shampoos" (Col. 2, lines 25-31).

Roulier et al also disclose that the composition can also contain cosmetic active agents, such as humectants, that may be present in the final composition in an amount ranging between 0% to 20% (Col. 5, lines 8-14). By way of example, the invention discloses a formulation for dry shampoo wherein maize starch the common name for zea mays starch, according to the

USDA Natural Resources Conservation Service Plants Database), is present as 35% by weight of the total composition (Col. 6, lines 15-28), and the "matrix comprising a cellular network formed from a starch-rich product represents from 70% to 98% by weight of the weight of the total composition" (Col. 8, lines 1-4, claim 9).

One of ordinary skill in the art would be motivated to combine the teachings of Roulier et al with the teachings of Müller et al, because they teach overlapping subject matter, most notably compositions that include shampoos that are comprised mainly of destructurized starch carriers that are water-dissolvable.

Müller et al teach a composition, which has an aqueous phase, for caring for the hair, skin or teeth in which a cleaning action is essential, including for example, "shampoo, shower gel, foam bath, liquid soap, manual dishwashing composition or hair conditioning composition" (Abstract; see also Col. 6, lines 8-13). "The composition according to the invention can be provided in any form, for example, as solution, emulsion, suspension, gel or foam. It can also be provided as a dry powdery composition which is reconstituted in an aqueous medium upon use" (Col. 5, lines 11-15). Müller et al teach that for all embodiments of their invention, can contain "additives selected from preservatives, perfumes, ... sun protection agents ...," etc. (Col. 8, lines 38-44).

Müller et al also teach that the starch is a spray-dried starch that comprises largely intact starch granules agglomerated to loose aggregates taking on the form of indented spheres where the majority of the granules are whole and unbroken (Col. 24, lines 58-67 through Col. 25, lines 1-4).

In view of the foregoing, it would have been *prima facie* obvious to one of ordinary skill in the art to make a solid cosmetic composition and/or foamed solid cosmetic composition with a zea mays starch base with a deposited fragrance and cosmetic agent.

Conclusion

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alicia Hughes whose telephone number is 571-272-6026. The examiner can normally be reached from 9:00 AM to 5:00 PM, Monday through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ardin Marschel, can be reached at 571-272-0718. The fax number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR of Public PAIR. Status information for unpublished applications is available through Public PAIR only. For information about the PAIR system, see http://pair-direct-uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

12 April 2007
ARH

BRIAN-YONG S. KWON
PRIMARY EXAMINER